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Supreme Court, U.S.

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No. 90-

IN THE
Supreme Court of the United States

October Term, 1990

JACK DUCKWORTH and
INDIANA ATTORNEY GENERAL,

Petitioners,

v.

HERMAN C. BERNARD,

Respondent.

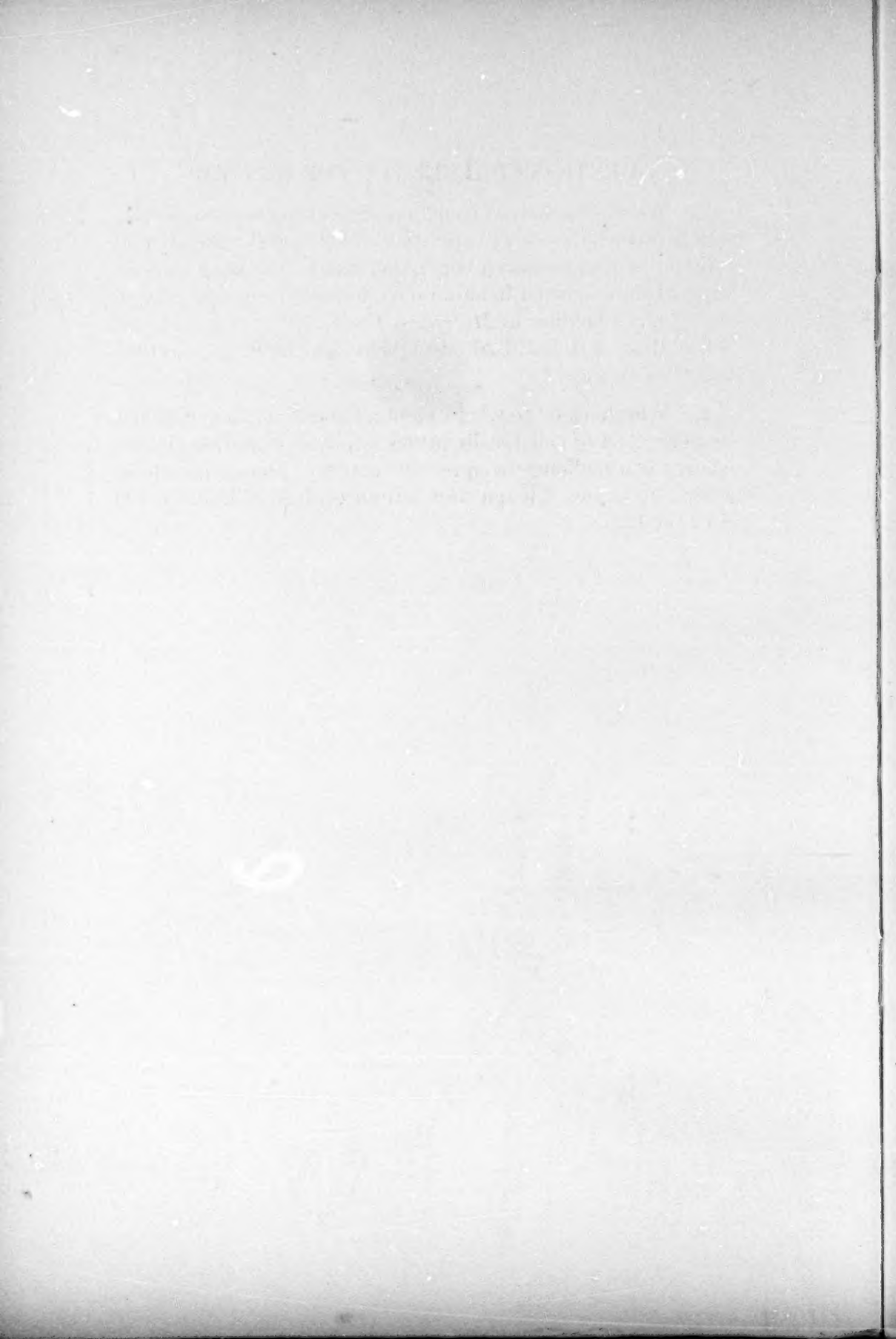
**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a district court has subject matter jurisdiction to consider a habeas corpus petition which directly challenges a fully served and expired conviction which was later used to support an enhanced habitual offender sentence, contrary to this Court's holding in *Maleng v. Cook*, 490 U.S. —, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989), and holdings of other courts of appeals.

2. Whether and to what extent a habeas petitioner should be permitted to collaterally attack expired convictions in the context of a challenge to a present sentence enhanced by those prior convictions, the question left unresolved in *Maleng*, 109 S.Ct. at 1927.

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JACK DUCKWORTH and
INDIANA ATTORNEY GENERAL,

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v.

HERMAN C. BERNARD,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

The petitioners (hereinafter "the State") hereby respectfully petition the Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in *Herman C. Bernard v. Jack Duckworth, et al.*, No. 89-3307, on September 19, 1990. The judgment summarily reversed the United States District Court for the Northern District of Indiana, which dismissed the respondent's habeas corpus petition for lack of subject matter jurisdiction under *Maleng v. Cook*, 490 U.S. ____, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989).

OPINIONS BELOW

The Seventh Circuit's order of September 19, 1990 summarily reversing the district court is not reported, and is reprinted in the Appendix at A-1.

The memorandum and order of the district court and its judgment dismissing the habeas corpus petition of October 5, 1989 are not reported, and are reprinted in the Appendix beginning at A-2.

JURISDICTION

The judgment to be reviewed was entered on September 19, 1990. No petition to rehear the judgment was filed.

This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

28 U.S.C. §2241(c) provides in pertinent part:

The writ of habeas corpus shall not extend to a prisoner unless-

* * *

(3) He is *in custody* in violation of the Constitution or laws or treaties of the United States; * * *.

[Emphasis supplied.]

28 U.S.C. §2254(a) provides:

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for the writ of habeas corpus in behalf of a person *in custody* pursuant to the judgment of a State court only on the ground that he is *in custody* in violation of the Constitution or laws or treaties of the United States. [Emphases supplied.]

STATEMENT OF THE CASE

The respondent, Herman C. Bernard (hereinafter "Bernard"), filed with the district court a form petition for a writ of habeas corpus. The petition stated that the "judgment of conviction under attack" was a sentence of "one year imprisonment" for possession of stolen goods dated "June 28, 1973" in the Superior Court of Marion County, Indiana. (App., A-4.) The petition further stated that the conviction was entered upon a guilty plea, and had been challenged in a state post-conviction proceeding in which relief was denied in July 1987. (App., A-5 - A-6.)

The single ground for the petition, set forth in an attachment, was that the petitioner's 1973 guilty plea "was not entered intelligently and voluntarily." Specifically, the petitioner claimed that he had believed he was receiving a misdemeanor conviction, based on the fact that he would serve six months in a county jail. (App., A-8.)

Although not a ground for relief, the petition also stated that the 1973 conviction had been used in 1986 to enhance a theft conviction under the Indiana Habitual Offender law, resulting in a 30-year sentence. (App., A-7.) In answer to a question about any "future sentence" to be served, the petitioner set forth the fact that the "[s]entence under attack" had been used to support an habitual offender enhancement; in answer to a question asking whether he had filed or "contemplate[d] filing" a petition attacking that judgment, he checked "Yes." (App., A-9.)

The district court on August 7, 1989 ordered the State to show cause why habeas corpus relief should not be granted. The State responded by moving to dismiss the petition for lack of subject matter jurisdiction, asserting that Bernard was not "in custody" pursuant to the 1973 conviction under *Maleng v. Cook*, 490 U.S. —, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989). Bernard filed a short "traverse" which simply pleaded denial of the State's assertions as to jurisdiction.

The district court dismissed the petition on October 5, 1989. The court paraphrased *Maleng* to hold "that a prisoner was not 'in custody' with respect to the conviction of sentences that have fully expired, even where those convictions have later been used to enhance a sentence presently being served." Therefore the district court found that it lacked subject matter jurisdiction. (App., A-2.)

Bernard filed a timely notice of appeal and requested a certificate of probable cause, which the district court granted on October 18, 1989. In the Seventh Circuit Bernard moved for appointment of counsel; briefing of the appeal was stayed pending a ruling on that motion. The motion for counsel was denied on June 22, 1990, but Bernard petitioned for reconsideration and the briefing schedule was again stayed.

On September 19, 1990 a panel of the Seventh Circuit issued an order stating in pertinent part:

IT IS ORDERED that the motion for counsel is DENIED. However,

IT IS FURTHER ORDERED that the district court is summarily reversed based on *Lowery v. Young*, 887 F.2d 1309 (7th Cir. 1989), and the case is remanded to the district court.

(App., A-1.)

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT'S HOLDING THAT A DISTRICT COURT HAS JURISDICTION TO ENTERTAIN A DIRECT HABEAS CORPUS ATTACK ON AN EXPIRED CONVICTION IS CONTRARY TO THIS COURT'S HOLDING IN *MALENG* AND DECISIONS OF OTHER COURTS OF APPEALS.

1. **CONFLICT WITH *MALENG*.** Bernard's petition in this case unambiguously sought direct review of a fully expired conviction for which he received a one-year sentence in 1973. Bernard has made no effort in this case (or any other federal

petition) to challenge his *present* sentence on the ground that the 1973 conviction is invalid. It is also undisputed that Bernard is presently in custody pursuant to a subsequent habitual offender enhancement based in part on the 1973 conviction. See *Bernard v. State*, 540 N.E.2d 23, 27 (Ind. 1989) (the direct appeal from the habitual finding).

In *Maleng v. Cook*, 490 U.S. ____, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989), Cook's petition not only attacked his expired 1958 conviction, but (unlike Bernard's petition) also alleged that the expired conviction had been improperly used to enhance a 1978 conviction which had not yet been served. Therefore, the Court liberally construed the petition to attack Cook's 1978 conviction, thus bringing him within the "in custody" requirement. 109 S.Ct. at 1926-1927. However, the Court plainly and unanimously held that a prisoner who challenges only a fully expired conviction is not "in custody" under that conviction, and that the federal courts therefore lack subject matter jurisdiction to adjudicate his petition.

The Court held that a habeas petitioner does not remain "in custody" under an expired conviction "merely because of the possibility that the prior conviction will be used to enhance the sentences imposed for any subsequent crimes of which he is convicted." 109 S.Ct. at 1926. The Court went on to hold that actual enhancement based on the prior conviction does not change the result:

In this case, of course, the possibility of a sentence upon a subsequent conviction being enhanced because of the prior conviction actually materialized, but we do not think that requires any different conclusion. When the second sentence is imposed, it is pursuant to the second conviction that the petitioner is incarcerated and is therefore "in custody."

Id. Under this holding, therefore, it is clear that petitioner Bernard in this case is not "in custody" under his 1973 conviction notwithstanding the subsequent habitual offender enhancement.

The Seventh Circuit has attempted to circumvent the jurisdictional holding of *Maleng* by stretching the common law writ of error coram nobis far beyond its jurisdictional bounds. In *Lowery v. Young*, 887 F.2d 1309 (7th Cir. 1989), the case which formed the basis for the summary reversal in this case, the court held that a Wisconsin district court had jurisdiction to consider the validity of eight expired Georgia convictions used to enhance a Wisconsin sentence. The court appeared to construe the petition to attack the present Wisconsin confinement, based on attempts by the prisoner to amend his original petition (attempts not present in this case). However, the court also held that the petitioner's claim as to the expired Georgia convictions was "in the nature of error coram nobis," and was therefore within the district court's jurisdiction. 887 F.2d at 1313.

The common law writ of error coram nobis is available to federal courts under the All Writs Act, 28 U.S.C. §1651(a), to set aside judgments of conviction even after expiration of the sentence, in order to relieve the convicted person of collateral consequences. See *United States v. Morgan*, 346 U.S. 502 (1954). However, it has long been settled that coram nobis relief may be sought only in the court of conviction, and particularly has never been available in federal court to collaterally attack a state criminal judgment. *Theriault v. State of Mississippi*, 390 F.2d 657 (5th Cir. 1968); *Booker v. State of Arkansas*, 380 F.2d 240, 243-244 (8th Cir. 1967) (and authorities cited in both cases).

Therefore the Seventh Circuit's effort to avoid *Maleng* by finding jurisdiction in the writ of error coram nobis must fail. To the extent that the Seventh Circuit has required the district court to take jurisdiction of Bernard's attack upon his expired conviction, based on *Lowery*, its decision conflicts with *Maleng* and should be reviewed. U.S. Sup. Ct. R. 10.1(c).

2. OTHER CIRCUITS. The Seventh Circuit decision is also in conflict with decisions of other courts of appeals faced with attempts to attack expired state convictions which were later used to enhance a recidivist sentence.

The Eighth Circuit has affirmed the dismissal of petitions attacking expired state convictions, but without prejudice to the prisoner's ability to file a petition directly challenging the present confinement. *Taylor v. Armontrout*, 877 F.2d 726 (8th Cir. 1989). At least three judges of the Eighth Circuit are of the opinion that an attack on the present confinement must be properly pleaded as such, and that a mere passing reference to enhancement in a petition which otherwise attacks only an expired conviction is insufficient. *Flittie v. Solem*, 882 F.2d 325, 326-328 (8th Cir. *en banc* 1989) (Beam, J., joined by Gibson and Magill, JJ. concurring).

The Third and Tenth Circuits, following this Court's lead, have held that the district courts lack jurisdiction to consider direct challenges to expired convictions, but should construe such petitions as attacks on the present confinement. *Gamble v. Parsons*, 898 F.2d 117 (10th Cir. 1990); *Clark v. Commonwealth of Pennsylvania*, 892 F.2d 1142 (3rd Cir. 1989).

As noted, the Seventh Circuit has taken the position that the district court has jurisdiction to directly consider an expired prior conviction, based on *Lowery's* "coram nobis" theory. The Seventh Circuit later confirmed its view that district courts have jurisdiction to "invalidate" expired convictions in *Crank v. Duckworth*, 905 F.2d 1090 (7th Cir. 1990), *cert. pending sub nom. Duckworth v. Crank*, No. 90-489 (petition filed Sept. 4, 1990). Although the *Crank* panel did not expressly rely on *Lowery's* coram nobis theory, it held that "the district court must decide whether the [expired] 1974 conviction is constitutionally valid." *Id.* at 1092.

These differing approaches demonstrate a conflict among the courts of appeals which should be resolved by this Court. U.S. Sup. Ct. R. 10.1(a). The varying liberality of the courts of appeals in construing petitions attacking expired convictions will lead to inconsistent availability of relief for prisoners depending on the circuit in which the petition is filed. Furthermore, respondents faced with such petitions are without clear notice or direction as to what state criminal judgments they are

to defend, and district court orders to respond to such petitions are rarely specific in that regard.

Inconsistent pleading requirements from circuit to circuit are not the only undesirable result. Precise articulation of which conviction is under attack is necessary in order to evaluate procedural defenses to the petition: A prisoner may have exhausted his challenge to the *expired* conviction, but may not have exhausted a claim that the expired conviction was improperly used to enhance the *present* sentence.²⁰ It would be improper under such circumstances to force a prisoner to litigate an unexhausted claim by construing his petition to challenge a conviction never intended by him to be attacked. Delineation of the conviction under attack is also necessary in many cases to determine whether the petition is a successive petition subject to dismissal under Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts; and whether the prisoner is challenging the judgments of more than one state court in the same petition in violation of Rule 2(d), *id.*

This Court should grant certiorari, therefore, to consider adoption of the Eighth Circuit's practice of dismissing the petition without prejudice to refiling. This approach addresses the problems discussed above by requiring the prisoner to carefully consider and specify the convictions he wishes to attack, without risking consideration by the district court of an expired conviction outside its jurisdiction, and without forcing premature consideration of an unexhausted claim. That approach also puts respondents on notice of exactly what state judgments are at issue.

²⁰ In Indiana, and probably in most States, the facial constitutional validity of prior convictions is subject to attack by a defendant in a subsequent habitual offender proceedings. See, e.g., *Edwards v. State*, 479 N.E.2d 541, 547-548 (Ind. 1985).

II. THE EXTENT TO WHICH A HABEAS COURT MAY CONSIDER THE EFFECT OF AN EXPIRED CONVICTION ON AN ENHANCED SENTENCE IS AN IMPORTANT QUESTION WHICH SHOULD BE SETTLED BY THIS COURT.

1. STANDARD OF REVIEW UNSETTLED. In cases where a prisoner is presumed to be challenging a present recidivist sentence on the ground of invalidity of underlying expired convictions, the question of the extent to which a habeas court may "invalidate" those prior convictions is unsettled. The question was expressly left open in *Maleng*, 109 S.Ct. at 1927, and it is clear that the courts of appeals need guidance. U.S. Sup. Ct. R. 10.1(c).

The Seventh Circuit's characterization of federal review in these cases as "in the nature of error coram nobis," *Lowery*, 887 F.2d at 1313, is unsatisfactory at best because it is based on an empty jurisdictional premise. As explained above, coram nobis is not available in federal court as a device to collaterally review state judgments of conviction.

The Third Circuit (and the Seventh Circuit in *Crank*, *supra*) has suggested that the proper standard is arrived at via an "extension" of *United States v. Tucker*, 404 U.S. 443 (1972). In *Clark v. Commonwealth of Pennsylvania*, 892 F.2d 1142, 1152 (3rd Cir. 1989), the court vacated a state court's recidivist sentence upon finding that it was supported by an expired 1973 conviction in which there had been a denial of due process at a pre-trial juvenile certification hearing. The court found its "extension" of *Tucker* to be justified by this Court's citation of *Tucker* in *Maleng*, 109 S.Ct. at 1927, and the decision in *Johnson v. Mississippi*, 486 U.S. 578 (1988).

However, *Tucker* was a case brought by a federal prisoner under 28 U.S.C. §2255 in the court of conviction, and the Court held simply that a federal sentencing judge may refuse to consider expired convictions which have been found by another court to be constitutionally invalid. None of the concerns of comity and finality at issue in a direct challenge under §2254

were discussed. *Johnson* does not provide a basis for extending *Tucker*, as it was based solely on the Eighth Amendment as applied to death penalty cases.

2. PROPER STANDARD OF REVIEW. Certiorari should be granted in this case in order to consider whether *any* review of expired state convictions should be undertaken in habeas corpus proceedings attacking a state recidivist sentence. Bernard, the prisoner in this case, is typical of habeas petitioners who wait until they are faced with an habitual offender charge before mounting any sort of challenge to long-forgotten guilty pleas on grounds which go behind the facial validity of the judgment (such as exactly what advice was given by court-appointed counsel 17 years ago).

As noted by the Seventh Circuit in *Crank*, 905 F.2d at 1091, such review will often cross state lines, leading to disputes over who should defend the expired convictions and where the defense should be mounted. A distinction between cases involving interstate and intrastate prior convictions can be based only on principles of convenience, not comity. Full review of expired state convictions would also require reconstruction of old or lost records and the calling of aging witnesses to refute charges of defective trials or guilty pleas.

The "laches" rule, Rule 9(a) of the Section 2254 Rules, does not fully address these concerns of comity and finality, as it excuses the petitioner who can show that he could not have known of the grounds before the State was prejudiced by the delay. Prisoners often allege that counsel ineffectively advised them as to the availability of appeal or post-conviction relief, in addition to other creative excuses for the failure to seek relief until the forgotten guilty plea or other conviction returns in a recidivist proceeding decades later. A stricter standard is necessary.

In Indiana, a defendant charged as an habitual offender may collaterally attack a predicate felony on the ground that court records of the prior conviction reflect a constitutional infirmity of the type which undermines the integrity and reliability of the

determination of guilt. *Edwards v. State*, 479 N.E.2d 541, 547-548 (Ind. 1985). Once the defendant has been given a full and fair opportunity to raise this type of facial challenge, interests of comity and finality should induce reluctance on the part of federal courts to unearth the circumstances of these old convictions to find potential errors which the defendant himself deliberately chose not to contest as part of a plea bargain which netted him a reduced sentence.

The only question in such cases should be whether the latest sentencing court had before it proper *facial* evidence of a valid, constitutionally entered conviction. Such a standard would be analogous to the limited standard for reviewing Fourth Amendment claims in habeas cases. See *Stone v. Powell*, 428 U.S. 465 (1976). To hold otherwise would unduly hamper the States' efforts to incapacitate recidivists with a suddenly revived interest in the procedural minutiae of decades-old convictions.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

LINLEY E. PEARSON
Attorney General of Indiana

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Counsel for Petitioners

November 1990

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APPENDIX

UNITED STATES COURT OF APPEALS

**For the Seventh Circuit
Chicago, Illinois 60604**

September 19, 1990

Before

**Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge**

No. 89-3307) Appeal from the United
) States District Court for
HERMAN C. BERNARD) the Northern District of
<i>Petitioner-Appellant</i>) Indiana South Bend
v.) Division
JACK R. DUCKWORTH, et al.,) No. 89 C 358
<i>Respondents-Appellees.</i>) Judge Allen Sharp

This matter comes before the court for its consideration of the "MOTION FOR RECONSIDERATION" filed herein on July 23, 1990 by the pro se appellant, which is a motion to reconsider the denial of appointment of counsel. On consideration thereof,

IT IS ORDERED that the motion for counsel is **DENIED**.
However,

IT IS FURTHER ORDERED that the district court is summarily reversed based on *Lowery v. Young*, 887 F.2d 1309 (7th Cir. 1989), and the case is remanded to the district court.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

HERMAN C. BERNARD,)	
)	
<i>Petitioner</i>)	
v.)	Civil No. S89-358
)	
JACK R. DUCKWORTH; and)	
INDIANA ATTORNEY GENERAL.)	
)	
<i>Respondents</i>)	

MEMORANDUM AND ORDER

On August 7, 1989, *pro se* petitioner, Herman C. Bernard, filed a petition seeking relief under 28 U.S.C. §2254. The response and motion to dismiss filed by respondents on September 5, 1989, demonstrates the necessary compliance with the mandates of *Lewis v. Faulkner*, 689 F.2d 100 (7th Cir. 1982). The petitioner filed a Traverse on September 13, 1989, which is generally an admission and denial.

The petitioner was convicted of possession of stolen goods in Indianapolis, Indiana in Marion County, and was sentenced to a term of one year on June 28, 1973. It is beyond dispute that that sentence has now long since been served and expired. However, that sentence was used as a predicate for an enhancement of a sentence presently being served by the petitioner in the Indiana State Prison under Indiana's Habitual Offender Act.

This court must again visit the parameters of the recently decided decision of the Supreme Court of the United States in *Melang [sic] v. Cook*, ____ U.S. ____, 109 S.Ct. 1923 (1989). That case gave a precise and definitive definition to the term "in custody", as found in 28 U.S.C. §2254. There, the court held that a prisoner was not "in custody" with respect to the conviction of sentences that have fully expired, even where those

convictions have later been used to enhance a sentence presently being served. There is a limited progeny to that decision. Judge Posner addressed the problem briefly in *Ramsey v. Brennan*, 878 F.2d 995 (7th Cir. 1989). See also *Waldon v. Kowley*, 880 F.2d 291 (10th Cir. 1989), and *Taylor v. Armantrout* [sic], 877 F.2d 726 (8th Cir. 1989). *Melang* [sic] and its progeny, including authority in this circuit, clearly establish that there is a lack of an "in custody" requirement in this case. That lack of "in custody" deprives this court of subject matter jurisdiction under 28 U.S.C. §2254.

For that reason, the present petition must be, and hereby is, **DISMISSED. IT IS SO ORDERED.**

DATED: October 5 , 1989

/s/ Allen Sharp
Chief Judge
United States District Court

**PETITION UNDER 28 USC § 2254 FOR
WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY**

<hr/> United States District Court	<hr/> District Northern District of Indiana South Bend Division
Name Herman C. Bernard	Prisoner No. Docket No. 870212 S89-00358

Place of Confinement

Indiana State Prison
Post Office Box 41
Michigan City, IN 46360

<hr/> Name of Petitioner (include name upon which convicted)	<hr/> Name of Respondent (authorized person having custody of petitioner)
Herman C. Bernard	V. Jack R. Duckworth

The Attorney General of the State of: Indiana

PETITION

1. Name and location of court which entered the judgment of conviction under attack: Marion County Superior Court, Criminal Division Four; Indianapolis, IN 46204
2. Date of judgment of conviction: June 28, 1973
3. Length of sentence: One year imprisonment
4. Nature of offense involved (all counts): Possession of Stolen Goods

5. What was your plea? (Check one)

- (a) Not guilty ☐
 (b) Guilty ☒
 (c) Nolo contendere ☐

If you entered a guilty plea of one count or indictment, and a not guilty plea to another count or indictment, give details: _____

6. Kind of trial: (Check one) No trial; guilty plea

- (a) Jury ☐
 (b) Judge only ☐

7. Did you testify at the trial? Not applicable

Yes ☐ No ☐

8. Did you appeal from the judgment of conviction?

Yes ☐ No ☒

9. If you did appeal, answer the following:

- (a) Name of court _____
 (b) Result _____
 (c) Date of Result _____
 (d) Grounds raised _____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

Yes ☒ No ☐

11. If your answer to 10 was "yes," give the following information:

- (a) (1) Name of Court: Marion County Superior Court, Criminal Division Four; Indianapolis, IN 46204
 (2) Nature of proceeding: Petition for Post Conviction Relief
 (3) Grounds raised: Same as those raised herein
 (4) Did you receive an evidentiary hearing on your petition, application or motion?
 Yes ☒ No ☐

(5) Result: Denied

(6) Date of result: July 27, 1987

* * *

(d) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☒ No ☐

(2) Second petition, etc. Yes ☐ No ☐

(3) Third petition, etc. Yes ☐ No ☐

(e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not: _____

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely

check (a) through (j) or any one of these grounds.

- (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with the understanding of the nature of the charge and the consequences of the pleas.
- (b) Conviction obtained by use of coerced confession.
- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
- (i) Denial of effective assistance of counsel.
- (j) Denial of right of appeal.

A. Ground one: See attached

Supporting FACTS (tell your story *briefly* without citing cases or law): See attached

* * *

[TYPEWRITTEN PAGES INSERTED IN PETITION:]

GROUND AND SUPPORTING FACTS

Statement of the Case

In 1973, petitioner, then age 19, entered a plea of guilty to theft in violation of the Indiana Offenses Against Property Act. In 1986, the conviction was used as a prior felony conviction, under the Indiana Habitual Offender Act, to enhance a sentence petitioner received for another conviction of theft an additional 30 years.

The issue of laches was not raised by the State of Indiana at the appellate level, and is not at issue here.

GROUND ONE: Petitioner's conviction, sentence, and imprisonment are had in violation of the United States Constitution and Amendments thereto, in that they resulted from a guilty plea that was not entered intelligently and voluntarily.

SUPPORTING FACTS: At the time petitioner enter [sic] his plea of guilty, a statute was in effect in Indiana that provided:

Division of offenses. — All crimes and public offenses which may be punished with death or imprisonment in the state prison shall be denominated felonies; all (sic) (and) all other offenses against the criminal law shall be denominated misdemeanors.

Acts 1905, ch. 169, § 1, p. 584; Burns Ind. State. Ann. 9-101.

Petitioner entered his guilty plea on advice that he have [sic] to serve a six month term at the Marion County Jail. At the hearing held in the state court, petitioner testified undisputed that offenders who served their sentences at the Marion County Jail who were placed on trustee status had to be serving misdemeanor sentences, and that following his sentence to the Marion County Jail he was a trusty.

It is petitioner's contention that he entered his plea of guilty under the assumption that he was to be sentenced to a misdemeanor [sic] term, and that this place of confinement and trusty status verified this impression.

[FORM PETITION RESUMES:]

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state of federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: _____
14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
Yes ☐ No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:
- (a) At preliminary hearing: _____
 - (b) At arraignment and plea: Harry Kremer; Indianapolis, IN 46204
 - (c) At trial: _____
 - (d) At sentencing: See 15(b)
 - (e) On appeal: _____
 - (f) In any post-conviction proceeding: Bev Cummings, Deputy Public Defender, 309 West Washington Street, Indianapolis, IN 46204
 - (g) On appeal from any adverse ruling in a post-conviction proceeding: See 15(f)
16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
Yes ☐ No ☒
17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ☐ No ☐
- (a) If so, give name and location of court which imposed sentence to be served in the future: Sentence under attack was used as a prior conviction, and material element of an Information for Habitual Offender for which petitioner is presently imprisoned.
 - (b) Give date and length of the above sentence:
 - (c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes ☒ No ☐

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

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I declare under penalty of perjury that the foregoing is true and correct. Executed on

8/1/89

(date)

/s/ Herman Bernard

Signature of Petitioner

A handwritten signature, likely of Herman Bernard, is written in dark ink. It consists of a large, stylized capital 'H' followed by a series of loops and a final vertical stroke.

